

1419528 (Migration) [2016] AATA 4322 (16 August 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Sandeep Singh Gill

CASE NUMBER: 1419528

DIBP REFERENCE(S): CLF2012/118082

MEMBER: Susan Trotter

DATE: 16 August 2016

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:

- cl.801.221(2)(c) of Schedule 2 to the Regulations.

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Statement made on 16 August 2016 at 4:28pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 21 November 2014 to refuse to grant the applicant, Mr Sandeep Singh Gill, a Partner (Residence) (Class BS) visa under s.65 of the *Migration Act 1958* (the Act).
2. Mr Gill applied for the visa on 14 June 2012 on the basis of his relationship with his sponsor, Ms Epenesa Amy Ah Sam. At that time, Class BS contained only one subclass: Subclass 801 (Partner). The criteria for the grant of this visa are set out in Part 801 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.801.221 of Schedule 2 to the Regulations.
3. The delegate refused to grant the visa on the basis that Mr Gill did not satisfy cl.801.221(2)(c) because they were not satisfied that at the time of the decision that Mr Gill was the spouse or de facto partner, as defined, of Ms Ah Sam.
4. Mr Gill lodged an application for review of the delegate's decision with the Tribunal on 28 November 2014.
5. Mr Gill appeared before the Tribunal on 16 August 2016 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Ah Sam.
6. Mr Gill was represented in relation to the review by his registered migration agent.
7. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

ISSUES

8. Relevantly to this matter, clause 801.221(2)(c) of the Regulations requires that at the time of this decision, the applicant is the spouse or de facto partner of the 'sponsoring partner', who must be an Australian citizen, Australian permanent resident or an eligible New Zealand citizen who was specified in the related Subclass 820 visa application as the spouse or de facto partner of the applicant. In the present case Mr Gill claims to be the spouse of the sponsor, Ms Ah Sam, who is an Australian citizen and was identified in the Subclass 820 visa application. On the evidence before it, the Tribunal is satisfied that the sponsor, Ms Ah Sam, is the 'sponsoring partner' of Mr Gill.
9. 'Spouse' is defined in section 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: subparagraphs 5F(2)(a) - (d) of the Act. In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and sponsor's household and their commitment to each other as set out in regulation 1.15A(3), which is extracted in the attachment to this decision.

10.

11. It follows that the issues for the Tribunal to determine are:

(a) Are Mr Gill and Ms Ah Sam validly married?; and

(b) Are the other requirements of a spousal relationship met?

CONSIDERATION OF CLAIMS AND EVIDENCE

12. Mr Gill is a 30 year old citizen of India who first arrived in Australia in 2007.

13. This visa application was lodged by Mr Gill on 14 June 2012. According to the visa application, Mr Gill and Ms Ah Sam first met on 20 July 2011, committed to a long-term relationship on 24 December 2011 and married on 13 May 2012.

14. Mr Gill provided documentation to the Department and the Tribunal in relation to his and Ms Ah Sam's relationship, including statutory declarations of Mr Gill and Ms Ah Sam, friends and family, lease documents, various utility accounts and the like, photographs and various financial documentation.

15. Issue 1 – Are Mr Gill and Ms Ah Sam validly married?

16. Mr Gill and Ms Ah Sam were married on 13 May 2012 in Underwood, Brisbane. Neither Mr Gill nor Ms Ah Sam had previously been married. The Tribunal is satisfied that there was no impediment to the marriage. The Tribunal has sighted a certified copy of the Marriage Certificate and is satisfied on the evidence that Mr Gill and Ms Ah Sam were married on 13 May 2012 and continue to be validly married. S.5F(2)(a) is therefore met at the time of decision.

17. Issue 2 – Are the other requirements for a spousal relationship met?

18. The Tribunal considered all of the circumstances of Mr Gill's and Ms Ah Sam's relationship, including the matters to which it is required to have regard, pursuant to regulation 1.15A(3), in considering whether the other requirements for a spousal relationship were met at the relevant times.

19. Financial aspects of the relationship – including joint ownership of assets, and joint liabilities; extent of any pooling of financial resources, any legal obligations owed in respect of the other person; and the basis of any sharing of day-to-day household expenses.

20. The Tribunal accepts the separate and consistent evidence of Mr Gill and Ms Ah Sam that they pool their financial resources, including both of their incomes, and take joint responsibility for payment of their expenses.

21. The Tribunal questioned Mr Gill and Ms Ah Sam in relation to the joint bank accounts they hold and are satisfied that they both gave consistent evidence as to their bank accounts, the basis upon which monies in the accounts, or cash, are utilised to pay day-to-day household expenses and the nature, quantum and purpose of their joint savings.

22. Nature of the household – including any joint responsibility for care and support of children, the persons' living arrangements; and any sharing of the responsibility for housework.

23. Amongst other things, Mr Gill provided the Tribunal with documents confirming that he and Ms Ah Sam have a joint lease of premises, with the lease expiring on 24 October 2016. Further, both Mr Gill and Ms Ah Sam gave consistent evidence as to when they first lived together, following the return of Ms Ah Sam from South Korea where she worked for a short period in December 2011/ January 2012. Further, their evidence was consistent, although not a replica of the other person's evidence, as to their continuing residence together since that time, including the various homes in which they have resided, with whom and for how long, and their intention to continue to reside together on a permanent basis. The Tribunal accepts this evidence and further accepts their evidence that they take joint responsibility for the sharing of household tasks depending upon their respective work commitments.

24. Social aspects of the relationship – including whether the persons represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.

25. The Tribunal is satisfied from photographic evidence and numerous statutory declarations provided from family and friends that Mr Gill and Ms Ah Sam represent themselves as being married and are accepted as being married on that basis. They both gave consistent evidence when queried as to the nature of their social relationship, which is predominantly with each other or Ms Ah Sam's mother's side of the family. Further, both Mr Gill and Ms Ah Sam gave consistent evidence as to the visit of Mr Gill's parents with them for approximately four weeks at the beginning of 2016 and the arrangements that were made in the household for Mr Gill's parents' visit.

26. Nature of the persons' commitment to each other - including the duration of the relationship; the length of time they have lived together; the degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.

27. The Tribunal accepts the consistent evidence of Mr Gill and Ms Ah Sam that they first commenced a relationship nearly five years ago and have been married for just over four years. Both gave consistent evidence as to their future plans including specifically that pending the outcome of Mr Gill's visa application, their intention is to move to another home, hopefully one that they purchase and in particular possibly in the countryside given Mr Gill's preference to live in a less developed area than where they currently live. As regards future plans with respect to children, both Mr Gill and Ms Ah Sam gave consistent evidence as to the timing and number of children they have talked about having, which at this stage is only one child. Whilst a desire to have children is not an unusual future plan to express generally, the Tribunal was impressed with the consistency of the specifics of such plans in the evidence of Mr Gill and Ms Ah Sam.

28. The Tribunal also questioned both Mr Gill and Ms Ah Sam generally about the nature of their relationship, including their usual day-to-day and weekly routines. The evidence, although not an exact replica of each other's evidence, was entirely consistent and plausible. The Tribunal, having had the benefit of observing both Mr Gill and Ms Ah Sam in person, was also satisfied that they each show a significant commitment and genuine connection to each other.

29. Any other relevant considerations

30. The Tribunal has also taken into consideration a site visit conducted by the Department upon Mr Gill's parents at their home in India, and in particular, the responses Mr Gill's parents are said to have made to questions asked of them. Those matters are detailed in the delegate's decision which was provided to the Tribunal by Mr Gill when he lodged his application. The

Tribunal queried Mr Gill as to the responses of his parents said to be given. Notably, Mr Gill stated that his parents were questioned in the Hindu language and that whilst his father, although not his mother, has some use of that language, he considers there must have been misunderstanding between the Department and his parents as regards the questions asked and the answers given. The Tribunal is unable to reach any concluded view as to the veracity of the information recorded as being provided by Mr Gill's parents upon the occasion of the site visit and places some although limited weight on the answers recorded as being given by Mr Gill's parents.

31.

32. *Conclusion*

33. As already noted, the Tribunal has placed some limited weight on the recorded answers of Mr Gill's parents to the Department site visit, which might suggest a lack of a genuine relationship between Mr Gill and Ms Ah Sam. The Tribunal, however, places significant weight on the documentary evidence provided to the Tribunal as regards Mr Gill's and Ms Ah Sam's relationship together with their oral evidence and is satisfied that the documents and their oral evidence, which the Tribunal accepts in entirety, are consistent with and supportive of Mr Gill's and Ms Ah Sam's claimed relationship. Having had regard to all of the circumstances of the relationship, including the regulation 1.15A(3) matters, the Tribunal finds that Mr Gill and Ms Ah Sam do currently have a mutual commitment to a shared life together as husband and wife to the exclusion of all others, do currently have a genuine and continuing relationship and do currently live together on a permanent basis. S.5F(2)(b) to (d) are therefore met at the time of decision.

34. **CONCLUSION**

35. As the requirements of subparagraphs 5F(2)(a)-(d) of the Act have all been met, the Tribunal is satisfied that at the time of decision Mr Gill and Ms Ah Sam are in a married relationship and therefore Mr Gill is the spouse of Ms Ah Sam, the sponsoring partner at the time of decision. Therefore Mr Gill meets clause 801.221(2)(c) of Schedule 2 to the Regulations.
36. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 801 visa.

DECISION

37. The Tribunal remits the application for a Partner (Residence) (Class BS) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 801 (Partner) visa:
- cl.801.221(2)(c) of Schedule 2 to the Regulations.
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Susan Trotter
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).